United States Circuit Court of Appeals

For the Ninth District

THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY,

Plaintiff in Error,

vs.

JOHN B. STEVENS & COMPANY,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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Tacoma, Washington.

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This case has been before this Court on a former occasion, at which time, on a writ of error sued out by the present defendant in error from a judgment of the District Court denying in part

the relief prayed for, and on a writ sued out by the present plaintiff in error from the judgment awarding a part of the relief asked, this Court rendered a decision sustaining the contentions of the present defendant in error in every particular, and overruling the insurance company's every contention. (*John B. Stevens & Co. vs. Frankfort, etc. Ins. Co.*, 207 Fed. 757.)

The former decision of this Court declared the law of the case, and it was retried accordingly, resulting in a verdict of the jury in favor of defendant in error, the insured, for the full amount claimed.

The former decision is seemingly of so little importance that it has altogether escaped the notice of learned counsel, who have reargued the propositions of law already determined against him just as if they were a matter of first impression.

It was held, in substance, on the former appeal, that the provision in a policy of indemnity insurance requiring immediate notice of an accident to the insured's employees, is to be given a reasonable, not a literal construction, and means notice within a reasonable time under all the circumstances. So that, where it appeared that the insured did not know of the accident at the time it happened, and gave notice to the insurance company immediately, or within a reasonable time after learning thereof, the requirement of "immediate

notice" was complied with. And upon the question of reasonable time for giving notice, and having in view the purpose of the requirement, viz., in order that the insurance company might investigate the circumstances of the accident to the best advantage with a view of settling or litigating the claim, a notice given in such time as to fulfill these requirements, would be considered as having been given within a reasonable time, "under all the circumstances and conditions."

These principles were definitely settled on the former appeal, and became the law of this case in accordance with which it became the duty, not only of the Court, but of counsel as well, to respect in the conduct of the further procedings to be had in the case.

City of Seattle vs. N. P. R. Co., 63 W. 129.

Oldfield vs. Angeles, 77 W. 158.

Notwithstanding, counsel for plaintiff in error has completely ignored the former decision, so that in a brief of 90 pages the Court is not even advised of its existence. That counsel should find it expedient to cite scores of other cases, while ignoring the decision of this Court in the case at bar, conclusively proves that there is no merit in the present appeal.

The case was retried upon the same pleadings, presenting the same issues, as were involved in the first appeal.

The record in the former case shows that the insured offered to prove that one I. B. Merrill, while in its employ, met with an accident on or about July 18th, 1909, but continued at work until the 28th day of July, 1909, at which time he left the employ of Stevens & Co., and went to the hospital. Subsequently, and on or about October 19th, 1909, a letter was received from Fitch & Jacobs, Merrill's attorneys, making a claim that Merrill had been injured in an accident due to insured's negligence, and making a claim on account thereof. This was the first knowledge the insured had that Merrill had or claimed to have met with an accident while in its employ, and the notice thereof was given the insurer the same day. Notwithstanding that the insurance company had pleaded and assumed the burden of proving that it was prejudiced in the matter of the defense of the Merrill suit by the failure to have notice sooner, the insured offered to prove that the witnesses to the accident were all present in court at the trial of the Merrill case, except one Busard, who had left, but was present when notice was given on or about October 19th, 1909. We further offered to prove that the structure claimed to have occasioned the accident had been preserved, and that the very plank alleged to have broken, had been recovered, but that the entire plant of the insured, together with the hopper claimed to have occasioned the

accident, had been entirely destroyed by fire before the Merrill case was or could have been tried, so that in no possible aspect of the case could the insurance company have been prejudiced by the slight alterations alleged to have been made in the hopper after the accident, *but before insured knew thereof*, or that Merrill claimed to have been injured thereby.

This is the substance of what we offered to prove on the first trial, and which was held insufficient by the District Court to satisfy the requirement in the policy of "immediate notice," or notice, at the latest within ten days after the accident occurred.

But this view was not sustained by this Court, it being held that under the pleadings and offers of proof, the requirement of immediate notice had been satisfied, and upon proof of those facts, plaintiff would be entitled to recover.

John B. Stevens & Co. vs. Frankfort, etc. Ins. Co., 207 Fed. 757.

This decision being the law of the case, it follows, as of course, that the only question now open for review is, Does the evidence sustain the allegations of the complaint and make good the offers to prove held sufficient on the former appeal?

This question is not even touched upon by plaintiff in error, and it therefore remains for us

to point out the facts established by the jury's verdict in response to abundant and convincing testimony on the second trial, which more than make good the allegations of the complaint and offers to prove the facts determined by this Court sufficient to entitle the insured to recover.

(1) THE EVIDENCE FULLY ESTABLISHED THAT DEFENDANT IN ERROR HAD NO KNOWLEDGE OF THE ACCIDENT TO I. B. MERRILL UNTIL THE LETTER FROM FITCH & JACOBS, DATED OCT. 19TH, 1909, WAS RECEIVED, AND NOTICE THEREOF WAS GIVEN THE PLAINTIFF IN ERROR ON THE SAME DAY.

W. H. Moore, the secretary of the insured company, testified that he "first learned of the injury to I. B. Merrill when I received a letter from Fitch & Jacobs, in the following language:

> "Tacoma, Wash., Oct. 19th, 1909.
> John B. Stevens & Co.,
> Tacoma, Wash.
> Gentlemen:
> We represent Mr. I. B. Merrill who was injured on or about July 19th at your feed mill and warehouse while in your employ and through your negligence. If you desire to take this matter up with us before action is brought, please do so on or before the 23rd of this month.
> Yours truly,
> Fitch & Jacobs."

Immediately on receipt of this letter he notified W. H. Opie & Co., the agents of the insurance com-

pany, and by them was referred to Hudson & Holt, and by Mr. Holt to W. C. Ramm, the adjuster, and on Nov. 2nd received a letter from Ramm acknowledging receipt of report of accident and copy of summons and complaint, stating that the matter had been referred to the home office.

On Nov. 12th defendant in error received a letter from Mr. Ramm, advising that the company "deny any and all liability on account of the accident," etc. (Rec., 53-54.)

John B. Stevens, president and manager of defendant in error, testified:

> "I first heard that Merrill received an accident while in our employ when the letter came from Fitch & Jacobs. * * * The last time I saw Merrill was on the 11th St. bridge, just about half way across the bridge and I stopped him because I thought it was strange for him to be going to town that time of morning, and I inquired of him and he told me, 'I am sick,' he says, 'there is something the matter with me and I am going up to the doctor to find out.' * * * I said to him, well go up and find out what is the matter with you. * * * That is the last I saw of him. He made no statement indicating that he had been injured. * * * It must have been the date he left our employ. It was about the 28th day of July, 1909."
>
> (Rec., 64-65.)

H. C. Comstock, the foreman, testified:

> "The first I ever knew of an accident on the 18th or 19th of July was when we got the complaint in this suit. I first heard that Merrill claimed that a plank on the hopper had broken and caused him to fall when I read it in the complaint."

The sub-foreman, Bass, was dead at the time of the trial, but in the trial of the Merrill case he testified for defendant in error.

Plaintiff in error does not claim that any others connected with defendant in error had knowledge of the accident, or that such knowledge would be effectual to impute knowledge to the corporation.

To refute this abundant and convincing testimony, corroborated and confirmed, as we shall presently show, by all of the attendant circumstances and the inherent probabilities, plaintiff in error offered only the injured party, I. B. Merrill. It thus became solely a question of the credibility of the witnesses and the weight to be given their testimony, matters solely within the province of the jury, as the ultimate judge. It was for the jury to say who was telling the truth. The man Merrill was a wretched and abject specimen, whose uncorroborated testimony would be rejected by any one possessing the slightest judgment of human nature. But Merrill was not only uncorroborated as to all essential facts, he was flatly contradicted by Stevens, Moore, Comstock, Comstock's mother and wife.

Both Merrill and his wife testified positively that the accident occurred on July 18th or 19th. They did not fix the date as between these two days, but were positive that it was one or the other. (Rec., 80 and 84.) Merrill testified to conversations concerning the accident with Comstock immediately after it happened, saying that

Comstock asked if he was able to work the rest of the day, etc. (Rec., 76-77.) But Comstock testified that he went to Seattle on July 16th, being Tacoma day at the fair, and from there went to Everett, being absent from Tacoma for two weeks from July 16th, and therefore the conversation with Merrill could not have occurred. In this he was corroborated by Stevens (page 66); Mrs. Comstock, who was with him on his vacation (page 99), and by Mrs. S. P. Comstock, his mother, who was also with him (page 100.) These witnesses fixed the date by the circumstance that July 16th was Tacoma day at the Seattle fair. That fact was conceded. (Page 107.) This proof, therefore, was most reliable and convincing. *The jury must inevitably have found that Merrill's testimony was untrue in this most important particular.*

It was our contention that if in fact Merrill received his accident at the plaintiff's warehouse he did not attribute it to the fall until long afterwards, and not until his attention was directed to it by Dr. Read, his physician. Stevens testified that when he met Merrill on the bridge on July 28th, the latter told him he was sick and was going to the doctor to find out what was the matter with him. Dr. Read, who was sworn by plaintiff in error, testifies positively that Merrill did not attribute his trouble to an acident, and it was only when the history of the ailment was brought out by Dr. Read's questions that the accident Merrill claimed to have sustained was mentioned in connection with his ill-

ness. (Read, 92-93.) The fact that Merrill remained at work for twelve days after the accident strongly corroborates plaintiff's contention that they did not know Merrill claimed to have received a serious injury at the warehouse until the letter was received from Fitch & Jacobs.

As tending to prove that plaintiff knew of the accident the fact is cited that Merrill's wages were paid for a time. But in this respect Merrill received the same treatment that had been accorded to others in like case, nor did Mrs. Merrill, who came for the wages, ever claim that her husband's illness was due to an accident. (Rec., 63.)

Some confusion as to the date of the accident was due to the fact that Comstock testified that Merrill had told him long previous to July 18th, that he had fallen and hurt his side. But in Merrill's complaint he alleged that the accident occurred on July 19th, and the date is so given in the letter from Fitch & Jacobs. On this issue Merrill was recalled by Mr. Holt and it was proven that he was not hurt in June, had no conversation with Comstock in June, and defendant in error conceded that he was not hurt in June. (Rec., 132.) So also, *in the answer it is alleged that Merrill was hurt on or before July 19th.* Merrill says he was hurt but once. (Rec., 132.) So that we are agreed that the accident happened July 18th or 19th, at which time the alleged conversation with Comstock could not have occurred, as Comstock was in Seattle or Everett.

In this state of the record the court submitted the case to the jury by the following instruction:

> "The court instructs the jury that the requirement of immediate notice in the policy is not to be taken literally and as requiring notice under any and all circumstances immediately upon the happening of an accident under penalty of forfeiting all rights under the policy of insurance. The term must be given a reasonable and practicable construction and should not be construed so as to require an impossibility.
>
> The court has already defined to you what that would be. Immediately means with reasonable promptness, having in view all of the circumstances of the case but not to exceed ten days after the company did have knowledge of it.
>
> Therefore, if the jury believe from the evidence that plaintiff, though fully performing its duty as will be explained to you, had no knowledge of said accident at the time it occurred and that it gave notice thereof immediately, and without unreasonable delay after learning of the same, and that, at that time, the witnesses to the accident were still in the plaintiff's employ and could have been interviewed by the defendant's representatives and statements taken, and the defendant by then investigating could have learned of the material facts relating to the alleged accident, then, and in that case, the court instructs you that the notice was timely, and defendant could not avoid liability on the policy upon the plea that notice of the accident was not given within the time provided for in the policy." (Rec., 152-153.)

This instruction appears to be in exact accord with the decision on the former appeal, following

Empire State Surety Co. vs. Northwest Lumber Co., 121 C. C. A. 527, 203 Fed. 417.

(2) THE EVIDENCE PROVES BEYOND DOUBT THAT PLAINTIFF IN ERROR WAS IN NO WAY PREJUDICED BY NOT RECEIVING NOTICE SOONER.

Plaintiff in error argues that the question of predudice is not material. But we take it to be settled that the mater of prejudice is most material in determining the principal question of fact, viz., Was the notice given within a reasonable time under all the circumstances? Certainly notice given within such time as to enable the insurance company to protect itself as fully and to the same extent as if given "immediately," within the literal meaning of the word, must be considered as having been given "within a reasonable time under the circumstances," which is the legal meaning of the word "immediately," as used in these policies.

John B. Stevens & Co. vs. Frankfort etc. Ins. Co. supera.

Empire etc. Sur. Co. vs. Northwest Lbr. Co., supera.

This view was in harmony with the defendant's theory of the case until after the verdict had settled the issue against it. It is now pretended that the issue was immaterial and its submission prejudicial.

But if the submission of this issue to the jury, following the admission of testimony concerning the same, be error, it was invited error, of which plaintiff in error is now estopped to complain.

The complaint did not refer to the matter of prejudice on account of the delay in giving notice, simply alleging that the terms of the policy were complied with.

But the answer, for the first time, specifically and by way of a distinct defense alleges that owing to the delay in giving notice the witnesses became scattered, the evidence lost, alterations were made in the structure concerned in the accident, etc., so that it was no longer possible to defend the Merrill case.

This is denied by the reply, it being stated that all witnesses were present at the trial of the Merrill case, except one, who, however, was available when notice was given. It is alleged that an immaterial alteration was made in the structure, but was so made before plaintiff knew of the accident, or that the structure had occasioned the same; and further, in any event, the entire plant was destroyed by fire before the Merrill case was or could have been tried.

It will be seen therefore, that the matter of prejudice from the delay was brought into the case by the defendant's own counsel.

That a party is estopped from complaining of the submission to the jury of issues made by his own pleadings is not doubted.

3 Cyc. 244.

Neither did plaintiff go into this question in its case in chief. The matter was not referred to until Mr. Holt, in his cross examination of Comstock, went fully into the question in an endeavor to show

prejudice by the delay, by the alteration of the hopper and by the absence of the witness Busard. (Rec., 109-110.)

So that he is estopped, not only by his own pleadings, but by his conduct of the trial from complaining of the submission of this issue.

> "Relating to Evidence. Introduced by Complaining Party. An appellate court will not permit an appellant or plaintiff in error to assign as error the admission of evidence which he, himself, introduced, or which he, himself, elicited by cross examination of his adversary's witnesses in the trial of the cause in the court below."
>
> *3 Cyc. 244-245.*

So that we have here a typical case of "invited error," not only by the pleadings but by eliciting the proof, the admission of which is assigned as error.

Counsel fully realizes the predicament in which he now finds himself, as is shown by the excuse he offers for having so cross-examined Comstock, saying that it was solely for the purpose of discrediting his testimony, or by way of impeachment. But not being versed in the mysteries of Telepathy, and counsel not having made known at the time the limitations under which he sought to elicit this testimony, we were justified in supposing that it was offered in the usual way for the purpose of proving the issue tendered in his own pleadings.

Upon the question of fact, the proof was undisputed that no prejudice resulted on account of the delay in giving notice of the accident.

That all witnesses were present. (See Record, 106.)

That Busard was still working for defendant in error when notice was given. (See Record, 108.)

That the very plank Merrill claimed to have broken was found by Comstock shortly after suit was brought. (See Record, 105.)

This whole question of prejudice is only an afterthought. It was not referred to in the letter from the company dishonestly rejudiating its contract.

When Ramm, the adjuster, came to Tacoma after considerable delay, in response to the notice of the accident, he confined his attention to endeavoring to lay a foundation for "welching" on the policy, as he did not seek to see or interview a single witness or to make any inquiry into the circumstances of the accident, nor is it even pretended that he did.

We submit, therefore, that on the controlling questions in the case the record is perfectly clear and free of error.

Some assignments of minor and unimportant errors alleged to have occurred, are urged. We will briefly notice these.

It is complained that the Court erred in placing certain limitations on an alleged conversation between Comstock, the foreman, and Merrill at the latter's house.

The circumstances are these. That Comstock, at Merrill's request, went to see him. Comstock testified that in so doing he went of his own volition, without the knowledge or consent of his employer. In fact, he was simply paying a friendly visit. (Rec.,

103.) Merrill claimed that Comstock promised to pay his doctors' bills and his wages, and hoped that no suit would be brought against the company. All of this is denied by Comstock. These conversations first brought in by the testimony of Mrs. Merrill and Mrs. Tute. When first offered in connection with Mrs. Tute's testimony the following occurred:

> "By Mr. Holt. State to the jury, Mrs. Tute, what it was he (Comstock) said to you on that subject?
>
> Mr. da Ponte. That is objected to as irrelevant, immaterial and incompetent.
>
> The Court. *Under what rule do you claim it is admissible, Mr. Holt?*
>
> Mr. Holt. It is a declaration of Mr. Comstock *showing that he knew at that time.*
>
> Objection overruled."

Thereupon Mrs. Tute testified:

> "I said to Mr. Comstock, 'I feel sorry for Mrs. Merrill because they have been in such poor circumstances, and he said to me, You tell Mrs. Merrill not to worry, that Mr. Merrill's wages will continue the same as if he was working, and that he had just as much right to his wages as some others that had been in the factory, that got their wages all the time." (Rec., 94-95.)
>
> Similar testimony was given by Mrs. Merrill, to which objection was also made. (Rec., 83-84.)

In view of the admitted fact that Comstock was not acting in the course of his employment nor within the scope of his authority at this time, it is too clear that any knowledge acquired at the house or hospital is not imputable to the principal. I understand the rule to be elementary that the

doctrine of imputed knowledge or notice only extends to what the agent learns in and about the prosecution of the duties of his employment. Cyc. thus states the rule:

> "Notice to Agent as affecting Principal. The duty of an agent to inform his principal of all material facts is a duty which the law conclusively presumes the agent has performed, and a principal therefore is affected with knowledge of all material facts of which the agent receives notice or acquires knowledge while acting in the course of his employment and within the scope of his authority, although the agent does not in fact inform the principal thereof. Conversely a principal is not affected with knowledge which the agent acquires while not acting in the course of his employment, or which relates to matters not within the scope of his authority, unless the agent actually communicates his information to the principal."
>
> 31 Cyc. 1587-1590.
>
> *American Surety Co. vs. Pauly*, 170 U. S. 133.

The Court admitted the evidence as a circumstance tending to prove that Comstock knew of the accident *when it happened*, which was as favorable a ruling as plaintiff in error was entitled to.

Moreover, *this was the only purpose for which it was offered*, as stated by Mr. Holt in answer to the Court's inquiry as to the theory on which he claimed it was admissable.

Counsel next complains that the court's instruction as to receiving with caution the alleged conversations between Comstock and Mrs. Tute, Mrs.

Merrill and Merrill invade the province of the jury. That the Court was clearly within its province in so doing is well settled. In addition to the cases cited by plaintiff in error, see the following late case.

Graham vs. U. S. Advance Sheets Sup. Court Rep., Jan. 15th, 1914, p. 148. (L. C. P. Ed.)

Further complaint is made concerning a reference to counsel's argument. But what counsel said is not in the record, and therefore cannot be reviewed. It does not even appear whether the reference was to Mr. Holt's own argument, as it might have been for aught that appears.

On the general subject of notice, it has been our opinion that the Supreme Court of the United States, as well as this Court, is committed to the proposition that notice to an agent of the character of Comstock is not notice to the corporation.

F. & D. Co. vs. Courtney, 186 U. S. 342.

Am. B. Co. vs. Spokane B. & L. Co. 130 F. 739 (C. C. A. 9C.)

In the first case cited it is held that knowledge by a cashier and some of the directors of a bank, less than a majority, of the dishonesty and embezzlement by the president of a bank of the funds of the bank, will not be imputed to the bank as its knowledge so as to require notice of the embezzlement to be given the surety on the president's bond.

In the second case it is held by this Court that knowledge by the president of a building and loan asociation of the default and dishonesty of a cashier was not knowledge of the corporation, nor imputable

to it, and therefore, representations in an application for a policy of indemnity securing the honesty of such cashier to the effect that such cashier's accounts had been examined and found correct, made as inducements to the giving of the bond, and warranted to be true, did not constitute a breach of the terms of the application or make the corporation guilty of making false representations, *as such knowledge by the president was not imputable to the corporation.*

This conclusion is made to rest on our statute providing that the affairs of private corporations are vested in the trustees.

The matter of knowledge of any particular agent was not involved in the former appeal, and I do not find that these cases were called to the court's attention, though the Courtney case was cited on another point. Nor were they cited in the case of the Northwest Lumber Co., 203 Fed. 417. In as much as the foreman, Williams, in the latter case was found to have been charged with no duty to give notice, *the point was not involved whether, had he been so charged, his knowledge would have been imputable to the corporation.*

We submit that the Courtney and Spokane cases are decisive of the point that it is immaterial whether Comstock had knowledge or not, as in no event is such knowledge imputable to the corporation.

For still another reason it is immaterial whether Comstock knew of the accident prior to October

19th, and consequently, it is immaterial that the court limited the testimony concerning the conversation at Merrill's house to the only purpose for which it was offered. This is true because, as already pointed out, the proof was undisputed that the insurance company was in no way prejudiced in any of its rights by not having notice sooner. Even if it be conceded that Comstock knew of the accident, or that he learned thereof in the conversation at Merrill's house, yet the notice given the insurance company on October 19th, 1909, was within a reasonable time under all the circumstances, and the jury were fully justified in so finding under the court's instructions applying the principles settled by the former appeal.

We submit that no error was committed, and pray that the judgment be affirmed.

Respectfully submitted,

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